No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

HON. CHASE A. CLARK, District Judge

R. P. PARRY
J. R. KEENAN
GRAYDON W. SMITH
Attorneys for Appellant, of Twin Falls, Idaho
DOUGLAS B. MAGGS, Solicitor
ARCHIBALD COX, Associate Solicitor
DOROTHY M. WILLIAMS, Regional Attorney
EARL M. RODMAN, Attorney
CHARLES H. ELREY, Branch Manager,
All for Appellee, 208 U. S. Court House, U. S. Dep't. of Labor, Portland, Oregon
E. H. CASTERLIN, Attorney
HOWARD E. HILBURN, Sr., Inspector-in-charge,
All for Appellee, Federal Building, Boise, Idaho.

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FEDERAL JURISDICTION

That jurisdiction to determine the instant controversy lies properly in the Federal Courts is not denied by either party. Jurisdictional foundation for this case was laid thus:

(a) July 17, 1944, Appellee, Administrator of Wage and Hour Division of the U. S. Department of Labor, issued a Subpoena Duces Tecum to Appellant requiring Appellant to appear before certain officers of the Appellee at the Rogerson Hotel, Twin Falls, Idaho, and there testify, and to there produce certain documentary evidence allegedly "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation of Sections 7 (a), 11 (c), 15 (a) (1), 15 (a) (2) and 15 (a) (5), of the said Act." (p. 23).

(b) Appellant refused to and did not appear as so requested and ordered to do. (p. 35, 6).

(c) October 6. 1944, Appellee applied to the United States District Court for the District of Idaho, Southern Division, for an order compelling Appellant to comply with said Subpoena Duces Tecum. (p. 2). The statutes which authorized Appellee to so apply, and which conferred jurisdiction upon the said Federal District Court of Idaho, Southern Division, are: Fair Labor Standards Act of 1938 (c) 676, 52 tSat. 1069; 29 U.S.C.A. Section 201 et seq.

(d) December 29, 1944, the Federal Court ren-

dered its decision ordering Appellant to comply with said Subpoena Duces Tecum (p. 46) and January 16, 1945, an Order was duly filed directing Appellant to comply with said Subpoena. (p. 49).

(e) January 16, 1945, Appellant filed Notice of Appeal from said Order of Compliance. Authority for this Circuit Court of Appeals to entertain this Appeal is Section 128 (a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925, 43 Stat. 936, 28 U.S.C.A. sec. 225.

Statement of the Case

The Fair Labor Standards Act, the one involved in this action, by its own terms, exempts retail service establishments, the greater part of whose business is intra-state commerce (29 U.S.C.A. Sec. 213, p. 509).

The only question involved in the instant proceedings is: Does the Administrator of this act *have the right* to take control of, inspect, and examine the books and records *of any and all businesses,* regardless of whether they are exempt from the act or not?

The instant proceedings arose in this way: Certain inspectors working under the Administrator of the act, came to the store of Appellant, Detweiler Brothers, in Twin Falls and demanded the right to go through all of their books and records. The owners of the store refused them permission to do so, claiming that they were exempt from the pro-

visions of the act. There then ensued lengthy negotiations, with the owners of the establishment remaining adamant. The Administrator then issued a Subpoena Duces Tecum (Exhibit E to the application herein) which, in broad and sweeping language, required Appellant to produce a great volume of books, papers and records in the public lobby of the Rogerson Hotel at a specified time. Appellant's attorneys, both by prior letter and by appearance at the hotel advised the Administrator's representatives that they would refuse to obey this Subpoena because in their opinion, the Appellant was exempt from the terms of the act.

Appellee thereupon made application to the Federal Court for the District of Idaho, Southern Division, for an Order directing and requiring Appellant to comply with the Subpoena Duces Tecum. October 6, 1944, the Court issued an Order to Show Cause ordering Appellant to appear before it upon a date certain at Pocatello, Idaho, and show the Court why an order directing compliance with the Subpoena Duces Tecum should not issue. Hearing was duly had on the Order to Show Cause, Appellee supporting his Application and position with Affidavits (ps. 9, 15, 20, 21, 42) and letters (ps. 12, 14, 18), and Appellant supporting its Answer to said Application with counter-Affidavits (ps. 36, 39, 44) and one letter (p. 34).

Appellee's Affidavits, as found by the Court (p. 47), were based upon information and belief. Ap-

pellant's Affidavits were statements of fact (p. 47). Appellant, in response to the Order to Show Cause, sought to show that it was not within the purview of the Fair Labor Standards Act, and therefore did not have to obey the Subpoena Duces Tecum, contending that it was exempt as a retail service establishment within the meaning of the Fair Labor Standards Act; that it was not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act; that before the Appellee could obtain enforcement of his Subpoena it must be shown that Appellant was not exempt from the operation of the Fair Labor Standards Act; and that not to require the Appellee to show that Appellant was subject to the Act, would (1) be a violation of the constitutional limitation on search and seizure; (2) relegate the Courts of the United States to subordinate agencies of administrative bureaus; (3) deprive the Court of its inherent and inalienable right to exercise its discretion in the premises; and (4) be contrary to law in that it is not provided in the Fair Labor Standards Act, and Congress never intended that the private papers and effects of all citizens and corporations of the United States should be subject to examination and inspection of the Administrator of the Wage and Hour Division.

Appellee, on the other hand, has always contended that he had the absolute right to investigate any person, corporation or business in the United States

simply by alleging, upon information and belief, that such person, corporation, or business was within the Act.

December 29, 1944, the Court rendered its opinion (p. 46), stating that the weight of the Affidavits was in favor of Appellant, but that the Court had no discretion in the matter, and no alternative but to obey the voice of the Administrator because "the only purpose of the hearing before this Court is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's authority, and it is the conclusion of this Court that such an order should issue," (p. 49), and an order in accordance therewith was duly entered and filed.

This appeal is from that Order.

Assignments of Error

The Court erred in entering its order herein appealed from, for the following reasons:

I

Appellant's establishment is exempt as a retail service establishment within the meaning of the Fair Labor Standards Act. (See Point 1, p. 60, Transcript of Record).

II

Appellant is not engaged in commerce or in the production of goods for commerce within the meaning of the Act, and is therefore exempt from its oper-

ation. (See Point 2, p. 60, Transcript of Record).

III

Appellee failed to show appellant was not exempt as a retail service establishment or engaged in commerce or in the production of goods for commerce within the meaning of the Act. (See Point 3, p. 61, Transcript of Record).

IV

The order and decision herein appealed from violate Appellant's constitutional right to freedom of search and seizure, relegate the Federal Courts to subordinate agencies of administrative bureaus, prevent the Federal Courts from exercising any discretion at all in the premises, and are contrary to law in that it is not proveded for in the Fair Labor Standards Act. (See Point 4, p. 61, Transcript of Record).

ARGUMENT

The District Court decided two things. First, that the weight of the evidence was in favor of Appellant, i. e., that Appellant was not subject to the Act. Second, that the Appellee, the Administrator of the Wage and Hour Act had an absolute right to the enforcement of the Subpoena Duces Tecum, and that whether or not Appellant was within the Act was a question the Federal Court could not entertain.

Has the Administrator the absolute right to inspect any and all establishments?

We all know of the constitutional limitation on

search and seizure as expressed in the Fourth Amendment reading as follows:

> "*Unreasonable searches and seizures* — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

If we follow the position of the Administrator and the District Court, then, the Fair Labor Standards Act is above and beyond this constitutional limitation. We question their interpretation of the act, for we find in Section 11 (a), the following:

> "The Administrator or his designated representative may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in *any industry subject to sections* 201-219 *of this title*, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of sections 201-219 of this title . . ."

The italic phrase of the above section 11 (a) obviously meant something. It meant that only

industries subject to the Act could be investigated. The latter portion of that section provides that the Administrator may enter and inspect places subject to the Act, and their records, question their employees and so forth in order to determine if any violations of the Act have occurred.

Section 11 (c) of the Act provides:

> "Every employer *subject to any provision of sections* 201-219 *of this title* or of any order issued under sections of this title shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate *for the enforcement of the provisions of section* 201-219 of this title or the regulations or orders thereunder."

Obviously, the italic language in the above section also meant something. It meant what it said; that only employers subject to the Act need make, keep and preserve such records, and so forth as therein set out.

General Tobacco & Grocery Co. v. Fleming, (1942; CCA 6th) 125 F.2d 596, is summarized thus in Volume 2, Wage and Hour Cases:

> "Administrator does not have visitorial and

> inquisitorial power over all industry to determine whether any person has violated Act without a prior court hearing upon the issue of jurisdiction since such authority would extend the power of Administrator beyond the apparent intention of Congress and invade the constitutional immunity from unreasonable search and seizure."

A more detailed quotation, giving the gist of that case, is set forth in Appendix No. 1, page 40, of this brief.

In Application of Walling, (1943) Dist. Ct. N. J., 49 F. Supp. 659, it was also held that the Administrator in seeking to enforce a Subpoena Duces Tecum must show that the industry is within the Act. That Court said:

> ". . . the Administrator insists that the issuance of the Subpoena is in nowise dependent on proof of coverage and that under the broad provisions of section 11 (a) he has power not only to investigate and gather data concerning pertinent matters in any industry subject to this Act, but that he may also issue administrative subpoenas and secure enforcement of them in this Court regardless of the question of coverage, since that issue is not a jurisdictional fact to be determined by the Court before such enforcement, but is initially for the Administrator

to determine as a fact, binding on the Court.

> "Reliance is had in large part by the Administrator on the cases of Perkins v. Endicott Johnson Corp., 2 Cir. 128 F.2d 208, affirmed by the United States Supreme Court in an opinion recently handed down by Mr. Justice Jackson, 63 S. Ct. 339, 87 L. Ed. ....., and upon Holland v. Standard Dredging Corp. D. C., 44 F. Supp. 601."

The Court then distinguished the Endicott case by pointing out that there the employer by choice came under the jurisdiction of the Walsh-Healy Public Contracts, and that in accordance with that Act, upon complaint an investigation was had. The court said that case was governed by the Walsh-Healy Public Contracts Act, "*which differs specifically from the Fair Labor Standards Act of* 1938." And then the court said:

> "In the instant case, the Administrator without complaint and simply in quest of information upon which to base proceedings, should they be justified, issued his subpoena directing the production of certain records, the examination of which might or might not disclose a violation. The suggestion has been made that to deny enforcement of a subpoena such as the one issued in the instant case would be to divide proceedings into two distinct stages—one concerning the presence of 'Commerce,' and the other to

determine other elements of violation of the law.

> "There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto; and to the objection that this course of procedure would lead to unwarranted delay in the carrying out of the Act, it would seem reasonable to suggest that only in cases where doubt could exist, would such question as has been raised herein be the basis of objection, and should frivolous claims be made they could very easily be determined by the Court at the time of application for an order enforcing the terms of the subpoena."

The court also stated that in the Endicott case, "nowhere in the course of the opinion is there any rejection, specific or by patent implication, of the findings of the latter court as set forth in General Tobacco & Grocery Company v. Fleming," supra, which we have already discussed and which holds that Administrator must show employer is within Act. The court also said:

> "The trend and tendency of the present day is to enlarge the functions of administrative bodies in order to carry out the purposes of social legislation. Commendable as this is, the functions of the Courts remain, and those

> functions are not merely to act as an adjunct of administrative bodies, but rather in such instances as have been categorically indicated by Congress to implement the operation of such bodies. Desirable as the contribution of experts to government is, there is no indication that Congress has as yet determined to substitute a government of mere expert opinion, for a government of law.

Court concluded Administrator must show employer was covered by Act.

In Walling v. Benson, 137 F.2d 501, (CCA 8th), it was held that the Administrator must present to the Court sufficient grounds to convince the Court that one sought to be investigated was probably within the Act. We respectfully call the Court's attention to the pertinent quotation from that case set forth in Appendix No. 2, page 42 of this brief.

Certainly, no Court should go further than did that Court, which held that it was at least necessary for the Administrator to show that he had reasonable cause to believe that a given business was subject to the act before he was entitled to inspect its records. In this case with a mere statement on information and belief by the Administrator on the one hand, and the explicit statements in the Appellant's affidavits on the other hand, there is no showing of any "reasonable ground to believe" that this establishment is subject to the act, and consequently, under

the above holding, no ground to order the issuance of a subpoena.

We find one other case which seems to hold specifically that the Administrator, upon an information and belief application has not made a sufficient showing. The case is again only available to us in the Wage and Hour Cases, but there we find the following:

> "In proceeding to enforce administrative subpoena duces tecum, wherein the answer denies that Administrator has cause to believe that employer violated Act, the Administrator has burden of showing probable cause."
>
> (U.S.D.C. Miss., 1942; Walling v. Miss. Road Supply Co.) 2 Wage and Hour Cases, p. 1213.

We know that the question here under consideration, whether the Federal Court must obey when the Administrator says the magical words, is unsettled. In the Ninth Circuit, there is no decision on this question. Some of the cases which appear on their face to be contrary to the ones hereinbefore discussed, are not actually contrary. In some of them, the employer, or industry sought to be investigated, admitted it was doing some interstate business, or that part of its business was not a retail, service establishment within the exemption of the Act, and that part of it was. Some of them were decided under the Walsh-Healy Act, which applies only to those contracting with the Government.

For example, in Martin Typewriter Co. v. Walling, 135 F.2d 918, CCA 1, the showing of the employer in that case was decidedly different than the showing of Appellant here. There, the employer admitted that it sold and serviced in interstate business, by alleging "it was a 'retail and servicing establishment, the greater part of whose selling and servicing is in interstate commerce.' " Here, Appellant denies that it does any selling or servicing in interstate business. In Cudahy Packing Co. v. Fleming, 119 F.2d 209, before a subpoena of enforcement was issued, an extended hearing was had. The lone syllabus of that case reads:

> "The Administrator of the Wage and Hour Division had authority to issue subpoena duces tecum under Fair Labor Standards Act of 1938 to require employer to produce documents relating to wages paid employees and hours worked by them during certain period, and the federal District Court had jurisdiction to enforce the subpoena."

Miss. Road Supply Co. v. Walling, 136 F.2d 391, CCA 5th, very definitely states that issuing an order enforcing a subpoena is within the discretion of the Federal Court. In fact, it states, citing in support thereof, the United States Supreme Court decision, Jones v. Securities and Exchange Com., 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015, the rule as follows:

> "When called on for assistance under Sect. 9

> of the Act, which adopts the provisions of Federal Trade Commission Act, 15 U.S.C.A., sec. 49, 'any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy, or refusal to obey a subpoena . . . issue an order . . .' The language is not mandatory, but permissive. If on the face of things a lawful enquiry is in progress, the court ought to assist it, assuming that the enquiring body will confine itself to its lawful functions. Bradley Lumber Co. v. N.L.R.B., 5 Cir. 84 F.2d 97. The burden indeed of showing that the inquiry is lawful is upon him who is called on to show cause why a subpoena should not be obeyed. The presumption of regularity of the proceedings of public officers so places the burden, unless on the face of the proceedings they are unlawful or oppressive. *But if it is made to appear that the investigation is clearly without just authority, as that the person investigated is clearly not under the Act and that grave inconvenience or injury may result, the Court may very properly decline to assist.*" (Emphasis ours.)

The Court went on to say that from a preliminary hearing, it appeared that some of the employees were probably engaged in interstate commerce, and that there was doubt as to "whether the Company was a retail and service establishment."

The case of Fleming v. Montgomery Ward & Co., 114 F.2d 384, CCA 7th, is decidedly different than

this one. There the Company admitted it was engaged in interstate commerce, but opposed the subpoena on the ground it was unreasonable search and seizure, and that the Administrator must show reasonable grounds to believe a violation of the Act had occurred, and that immunity against self-incrimination protected the Company from search and seizure. The court held that since the Company was admittedly subject to the Act, that the Administrator did not have to prove reasonable ground to believe a violation of the Act had occurred; that it was not unreasonable search and seizure; and that since the Company was a corportion it was not, as such, protected by immunity against self-incrimination which is guaranteed by the Fifth Amendment.

Also distinguishable is the case of Cudahy Pkg. Co. v. Fleming, 122 F.2d 1005. There, the Company admitted

> "that it is engaged in interstate commerce at its Newport plant, but contends that the business of the St. Paul plant is intrastate only."

The Company however in refusing compliance with the subpoena insisted it need only turn over records pertaining to employees "concerning whom complaint had been made." The court there held that where it was admitted that part of the employees were subject to the Act and part were not that the Administrator had the right to investigate to determine which employees were engaged in interstate

commerce and which were not. However, the Court frowned upon "fishing expeditions" by saying:

> "All the records required by the subpoena here involved were for a reasonable period (being from Oct. 24, 1938, to Nov. 16, 1940), under the circumstances of the case, and were relevant to a legitimate field of inquiry under the Act. There was no attempt to conduct a general fishing expedition such as was condemned in Federal Trade Commission v. American Tobacco Company, 264 U. S. 298, 44 S. Ct. 336, 69 L. Ed. 696, 32 A.L.R. 786."

The first sentence of the opinion in Walling v. American Rolbal Corporation, 135 F.2d 1003, is:

> "The appellant is a corporation engaged in the manufacture of ball and roller precision bearings and is admittedly subject to the provisions of the Fair Labor Standards Act of 1938."

Clearly, it is not precedent for the case at bar.

Do the United States Courts have any voice in determining whether or not the Administrator of the Wage and Hour Division is entitled to enforcement of a Subpoena Duces Tecum in this case, or in any case? The opinion herein appealed from, without giving reasons therefor other than saying the Endicott Johnson case is controlling, holds that the Administrator has an absolute right to enforcement of his Subpoena Duces Tecum. The opinion holds to that effect after stating that the weight of the evi-

dence is to the effect that appellant is not subject to the Act.

We have read, we believe, all the cases available to us on this particular point. Not one of the cases which seems to hold, or which indicates, that the Administrator has the Absolute Right to enforcement of his Subpoena Duces Tecum, without first showing that the one to be investigated is within the Act, contends that the pertinent statutes give that right to the Administrator in express terms or in plain, simple language. In each case, the court has, as baseball players say "had to reach for that one," in order to support its interpretation of the pertinent statutes with seeming logic. One reading of the statutes and those cases wherein the "give-it-up" philosophy* has been applied, shows how far these Courts have strayed from their once stalwart position. The opinion of the District Court herein appealed from is a perfect example of the trend of the judiciary to give up its responsibility.

In early English history, as we all know, the King was Supreme. Then came Magna Charta and with it a new vista, a new horizon. Still, the King ruled and the English Courts did not really achieve the independence which has so differentiated government and life in England and America from that of continental Europe and other countries of the world, until long after that famous Sunday, November 10, 1607, when Sir Edward Coke, in Prohibition

*Am. Bar Ass'n. Journal, Sept. 1944, p. 501.

Del Roy, 12 Coke's Reports 63, stated: "Rex non debet esse sub homine, sed sub Deo at Lege" (The King ought not to be under man, but under God and the Law.) However, the English Courts had to fight constantly to preserve their freedom of judgment and action, and they learned through bitter experience that liberty was the price of ever constant vigilance and judicial courage. As stated by John Dickinson, Administrative Justice and the Supremacy of Law, p. 94 et seq:

> "So long as judges were mere officers of the King, law could operate only intermittently as an agency to control the King. Hence the long struggle in England, throughout the century following Coke's death, to secure the independence of the judiciary, and hence the ingrained notion which we have inherited, that it is wrong for judges to be governmental officers . . . In the United States Coke's doctrine has been what we built upon."

And so one of the fundamental elements of our government, built with a purpose into our Constitution by the founders of this country, was the independent and separate judiciary. Its Bible was the written Constitution which was to be the Supreme law of the land. The traditional common-law jealousy of administration, developed in the contests between the courts and the Stuart Kings, which we inherited from the English, was "kept alive by the distrust of administration in pioneer societies" and

unfortunately it "took form in an over-narrow analytical conception of the separation of powers which proved unworkable in the transition from a rural agricultural to an urban industrial society." (Am. Bar Ass'n. Journal, March, 1944, p. 121).

From this one extreme, of a judiciary which was over-technical and super-cautious in protection of the fundamental freedoms of the individual, the pendulum has swung with the times to the far side of its arc. As stated by Joseph B. Eastman, Chairman of the Interstate Commerce Commission and Director of the Office of Defense Transportation:

> "The Courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction." (Am. Bar Ass'n. Journal, May, 1944, p. 266).

Roscoe Pound, Am. Bar Ass'n. Journal, September, 1944, p. 501, said:

> "The rise of administrative agencies, claiming and to some extent enjoying immunity from judicial review of their action, has been introducing the Roman type of public law into our system and there are teachers of laws and of politics who assert that it is 'gradually eating up' the private law which secures the individual rights of the citizen."

Now, the particular interest of the particular indi-

vidual is of no consequence. All we need worry about is the over-all purpose which is labelled "good"; it matter not who be injured by the wayside.

Administrative agencies, a necessary and concomitant part of social legislation and reforms, have mushroomed to unheard of and unbelievable proportions. Their very numbers and size seem to have over-awed some of our Courts. Some Courts no longer feel free to exercise an independent opinion, and render decisions based not upon their own thoughts or convictions, but act upon direction of administrative officers of the executive branch of the government. They have become, in fact, "officers of the King."

The subjugation of the judiciary by the Executive branch of a government has always been considered, in so-called democratic or free countries, the darkest blot of all. As stated by the Honorable George W. Maxey, Chief Justice, Supreme Court of Pennsylvania:

> "The third 'indispensable' to equilibrium between liberty and government is an independent judiciary. Its function is to determine between individuals and between the individual and the government what is justice under the law, and to keep every governmental department and official within their constitutionally assigned spheres. Such a judiciary maintains the equilibrium between liberty and government. Servile judges mean an enslaved people. Ten years

ago Adolph Hitler declared himself the depository of all judicial power in Germany. Napoleon III in his march to absolutism in France reduced French judges to abjection. Victor Hugo described them as follows: 'What a spectacle is that flock of judges, with drooping head and bended back, driven at the butt-end of a musket to the perpetration of every infamy and every crime!' The finest fruitage of the English Revolution of 1688 were independent tribunals of justice. A major charge against George III, in the Declaration of Independence, was that he had 'made judges dependent on his will.'

"All history proves that liberty endures only under law." (Am. Bar Ass'n. Journal, Feb. 1944, p. 65).

The subjugation of the judiciary in our country is being brought about through the gradual encroachment of administrative agencies upon heretofore virgin rights, kept ever pure by the core of America, the Independent Judiciary. Now, the administrative agencies and bureaus not only administer but legislate. As said by Hatton W. Summers in Readers' Digest for September, 1943: "One bureaucrat in the Securities and Exchange Commission said recently: 'We do make the law. This order supersedes any laws opposed to it.' Actually the bulk of what in effect are our general laws are now being made not by Congress but by bureaucracies." Worse than the fact that they legislate is that they usurp

the power of the Federal Court and make decisions without any semblance of a fair and impartial trial. As stated by Joseph W. Henderson, President, American Bar Association:

> ". . . There is a tendency of administrative agencies to decide without adequate hearing, or without hearing one of the parties, or to decide first and 'make the record' to support it later.
>
> "In Federal Communications Commission v. National Broadcasting Co., Supreme Court of The United States, May 17, 1943, 63 Sup. Ct. Rep. 1035, the government actually contended that where an order was made without a hearing against one entitled to a hearing, the latter could not appeal. This was properly rejected by the majority of the court. But the dissenting justices contended that to allow the appeal 'imposed a hampering restriction upon the functioning of the administrative process.' This suggests the justice of the peace who refused to hear evidence on behalf of the defendants because he found it hampered him in arriving at a judgment for the plaintiff." (Am. Bar Ass'n. Journal, Dec. 1943, p. 681).

For a better understanding of the background of our Courts and the growth of administrative bureaus, the virtues and dangers of each, we respectfully call the Court's attention to the articles mentioned in our authorities listed on pages 3 and 4.

This trend of administrative bureaus to tread more and more upon the rights of individuals has, we believe, reached a new high in the particular case at hand. Perhaps the most cherished essential of our judiciary system is the principle that we always hear the other side. Even the worst criminal is entitled to his day in court before judgment may be pronounced. So, we feel that it is really startling when we encounter a situation where the district court must issue to appellant an Order to Show Cause, and then after the Hearing on that order, the district court renders an opinion stating that appellant has no right to show cause; that appellant will not be heard. It seems to us a mockery of Justice that in America, a litigant must plead with the Courts TO BE HEARD.

This tendency of administrative agencies is well stated by Roscoe Pound in The Challenge of the Administrative Process, March, 1944, Am. Bar Ass'n. Journal, p. 123:

> "On other occasions I have pointed out tendencies of administrative determination abundantly illustrated in the operation of our administrative agencies which are confirmed by the report on the OPA. Most serious among them is one going counter to what has always been the first principle of judicial justice, namely, audi alteram partem, hear the other side. In administrative adjudication there is an obstinate tendency to decide without a hearing,

> or without hearing one of the parties or after conference with one of the parties in the absence of the other, whose interests are adversely affected, *or to treat the statutory requirement of a hearing as a mere formality and act upon preformed opinions as to the order to be made . . .* the apologists for administrative absolutism do not claim that it consists with our constitutions state and federal. But they say that we must look at these things 'Against a background of what we now expect the government to do,' and apparently in the administrative quest of social objectives it is considered that we do not expect the government or its agencies to treat the citizen fairly, even if we did when our constitutions were framed. We are told that the separation of powers antedates the rise of administrative attainment of social purposes and must not be suffered to stand in the way."

Absolute power reposed anywhere in anyone is bad enough but when it raises its ugly head camouflaged under the banner of social reform and advancement it is most dangerous.

In reading the decisions, which apparently the District Court relied upon, we find that they say that there is a safeguard which protects appellant's constitutional rights. It is this: After the Administrator investigates appellant and if appellant is violating some provision of the Act, the appellant will be given an opportunity to cease and correct the

violations. If appellant does not so cease and correct the violations, the Administrator will seek an injunction from the Court, and in this proceeding both coverage and violations will be adjudicated.

Thus, it is said, the one investigated eventually gets his day in court and a judicial determination as to whether or not he is within the Act. But let us stop and consider how an employer who is not within the Act may gain an adjudication upon that point. He must first violate some provision of the Act. Then, when complaint is filed against him accusing him of being guilty of a criminal offense and of refusing to cease committing said criminal offense, he may, it is said, get an adjudication upon coverage as well as upon the violation. In other words, the only way an employer may BE HEARD upon this very important point is when he is hailed before the Court as an offender. We seriously doubt if any one of the Courts which has held that the Administrator has an absolute right to enforcement of his Subpoena Duces Tecum, has been aware of the burden this arbitrary ruling will have upon hundreds of thousands of employers in this country. Have they considered all the regulations with which each employer must comply to keep on the good side of Heaven and the Administrator? Let us look at just a small part of one section of several sections composing the Rules and Regulations implementing the Fair Labor Standards Act, so that the court will have at least a preliminary look at the red tape and added over-

head thrust upon employers who are not within the Act.

Sec. 516, of Title 29 U.S.C.A. p. 581, being only a part of the Rules and Regulations implementing the Fair Labor Standards Act, provides the records that employers subject to the Act must keep. These regulations might change the particular employer's whole general set-up and scheme of organization. Under this section, it is provided that for employees subject to minimum wage and 40-hour week overtime provisions, a certain type of records must be kept (sec. 516.2) ; that for employees under certain union agreements who are to be paid for overtime over 12 hours a day or 56 hours a week, a certain type of record must be kept (sec. 516.3) ; that copies of certain agreements with labor representatives must be forwarded to Washington, D. C., and filed with the Administrator in a particularly way (sec. 516.3-b) ; that a particular record shall be kept for employes hired pursuant to the above-mentioned labor agreement (sec 516.3-c) ; that for bona fide executive, administrative, professional, local retail, and outside sales employees certain particular records must be kept. A statement from the report of the Committee of the Bar Association of San Francisco on Administrative Hearings of the Office of Price Administration, seems to fit in here:

> "It seems to be a characteristic of some of the recently established administrative agencies

to assume that ordinary citizens have nothing to do but to fill out questionnaires and otherwise serve in attendance upon the multifarious demands of the administrative agencies." (Am. Bar Ass'n. Journal, March, 1944, p. 123).

These regulations are voluminous and we wish the court would please examine them, in order to understand the magnitude of the problem facing individual employers, who honestly feel they are not subject to the Act, but who dread the imposition of the severe penalties, contained in sec. 216 of the Act. It is all very well to say that the Administrator will be fair with offenders and give them time to get in line, but American business has made this country strong by operating on a sound basis within the law. The good business man who wants to stay in business must know what he can do before he does it. It is essential to progress that the business man who feels he is not within the Act and who can not afford to be burdened with keeping records and complying with all the other thousands of regulations which those within the Act must necessarily keep, be given an early adjudication on the question of coverage. There is nothing secret about appellant's business. It would take no great amount of time and effort for this question of coverage to be decided and settled.

We feel that the Federal Court still maintains its dignity; that it has not become a mere rubber stamp, to be used, not as an arbiter or a medium of Justice, but as a sort of a filling station of POWER, where

the Administrator has the ABSOLUTE RIGHT to extract a weapon placing that forgotten man, the United States Individual Citizen in a straightjacket; empowering the Administrator to probe him, investigate him, analyze him, diagnose him and then operate upon him, for, let us say acute appendicitis. If it turns out that there is no acute appendicitis, there is no harm done. IT IS ALL IN THE INTEREST OF EXPEDIENCY OF ADMINISTRATION. Of course, the X-ray would have revealed that there was no acute appendicitis, just as a hearing upon the question of coverage would have revealed whether appellant was actually within the Act. The Administrator, however, does not care for this logical way of first finding whether an employer is within the Act, and then proceeding to investigate; but insists he be allowed to investigate and then prosecute, leaving the little matter of whether he has any right at all to harass the particular employer to be taken up at some indefinite time in the future.

The foregoing cases, especially when viewed in connection with their historical background, establish conclusively that the Federal Court should, and must, decide this question of coverage in a proceeding of this kind.

The opinion and order herein appealed from go a step further than any other case we have found. Here there is a statement by the Court that on the facts the appellant does not appear to be within the Act. Then, the Court concludes, *in the face of this*

factual finding, that it must enforce the Administrator's Subpoena Duces Tecum. We feel very deeply over this ruling of the District Court. It brings every activity in the whole country within the investigatory power of the Administrator. It seems to us a complete abdication, by the Court, of its constitutional role of guardian of civil rights and liberties. In no other reported case, that we have found, has the constitutional immunity from search and seizure been swept into the fire without some factual justification.

The decision of the District Court must be reversed for the reason that it is without any factual support and is contrary to the law.

IS THE RESPONDENT AN EXEMPT ESTABLISHMENT?

The court found:

> "On the date of the hearing on the order to show cause, the respondent filed a positive affidavit and later filed a supplemental affidavit, positively stating that they are a retail establishment and not within the Act, doing business solely within the State of Idaho. The affidavit of the administrator is on information and belief. The weight of the affidavits are in favor of the respondent as its affidavits are positive and the affidavit of the Administrator, as hereinbefore stated, is on information and belief." (p. 47).

There being no appeal by appellee (the Administrator), or any assignments of error, that finding of the District Court cannot be disputed here, and it stands undisputed that, on the facts, Appellant's establishment is a retail establishment, doing business solely within the State of Idaho.

The Applicable Law

With the facts established in this way, the weight of authority is clear that an establishment such as appellant's is within the exemption set out in Section 213 of the Fair Labor Standards Act, which is as follows:

> "The provisions of sections 206 and 207 of this title shall not apply with respect * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce . . ."

This Ninth Circuit Court has taken a very broad view as to what is included in the definition of a retail service establishment. In Walling v. Block, 139 F. 2d 268, there was presented a situation wherein a concern operating a chain of nineteen retail shoe stores, fourteen in Washington, three in Oregon and two in Idaho, maintained a central office and warehouse in Seattle where the merchandise was received from out state and redisbursed to the stores, and wherein all accounting, buying, advertising and managing was done. The question involved was

whether or not the employees at Seattle were included within the act.

Judge Bowen of the Western District of Washington held that they were not; that this was all a part of a retail service establishment as contemplated by the act. Upon appeal, the Ninth Circuit Court, in an opinoin written by Judge Healy, affirmed the lower court's decision, stating in part:

> "It appears to us that the work of the employees in the present case is plainly incidental to the operation of a retail business. While in some respects the functions performed at the central warehouse are comparable with those performed by the traditional wholesaler, yet obviously the analogy is superficial and incomplete. Large retail department stores have central business offices and maintain warehouses or stock rooms where goods are received and from which they are distributed to the various departments. These may be in the same building as the selling departments or in a separate building. The mere physical separation of appelle's warehouse from the stores themselves can hardly be regarded as a controlling factor."

Walling vs. Roland Elec. Co., 54 F. Supp. 733 held that an employer engaged in selling new and old electrical motors in intrastate commerce, repairing and reconditioning used motors, and installing and re-

pairing private, commercial and industrial wiring systems was exempt from Fair Labor Standards Act because engaged in a 'retail or service establishment.'

Twyman vs. Milk Bottlers Federation, 47 N. Y. S. 2d 206, held that the business of milk bottlers federation was that of a 'service establishment,' and as such within exception of the Fair Labor Standards Act.

An owner and operator of four retail food stores in one city and another in a different state all of which were operated as a single business unit under one management, contended he was engaged in a retail, service establishment, within the exemption of the Fair Labor Standards Act; and that the greater part of his business was intrastate. In Walling v. Wolferman, Inc., 54 F. Supp. 917, the court held that the owner was a retailer and not covered by the Act. Please turn to the quotation from that case in appendix 3, page 45 of this brief.

Under the rule announced in the foregoing cases, there can be no question but that the appellant's establishment falls in the exempt classification.

CONCLUSION

In view of the foregoing cases and the Court's holding that appellant's affidavits, to the effect that appellant's establishment is not within the Act, predominate over the appellee's affidavits, we respectfully submit that it must be considered that appellant's establishment is one that is exempt from the application of the Fair Labor Standards Act, and that, as such, under the best reasoned authority, the Administrator is not entitled to an order enforcing his subpoena.

If the Administrator is in the possession of any facts indicating that appellant's position is erroneous, the Court is open for him to allege, and at a proper hearing prove, those facts as a ground work for getting a subpoena. As the Court said in In Application of Walling, N. J., 49 F. Supp. 659, quoted above, there is no compelling reason why the Administrator should not establish this ground work in a proper hearing.

To require the Administrator to follow such procedure is only just and reasonable and in line with American jurisprudence as we know it. To take the extreme position, that even though the Court finds that appellant is not within the contemplation of the Act, the Federal Court must enforce the Subpoena Duces Tecum of the Administrator so that he can go through the records of any and all businesses, in an effort to establish whether or not they are subject to

the act, does violence to all our precepts of justice and it seems to us, is in direct conflict with our Constitution.

We submit the decision of the District Court should be reversed and the order herein appealed from vacated.

R. P. PARRY
J. R. KEENAN
GRAYDON W. SMITH
Attorneys for Appellant,
Residence, Twin Falls, Idaho.

APPENDIX

NO. I

"The averment of appelle (Administrator), on information and belief that appellant was engaged in interstate commerce was not subsequently supported by the introduction of any evidence. Appellant's answer, specifically denying any engagement in interstate commerce by appellant and its employees, described the conduct of its business as exclusively intrastate commerce. A fact question upon the jurisdictional issue of interstate commerce was thus tendered by the pleadings in the district court.

"But the court declined to try this issue . . .

"The Administrator contends, that, while in the first clause of the compound sentence of Section 11 (a) above quoted, the words 'industry subject to this act (sections 201-219 of this tile)' are used, there is no such limitation in the second clause of the sentence, and that, therefore, the Administrator has been accorded visitorial and inquisitorial power over all industry, to determine whether any person has violated any provision of the Act, or for the purpose of aiding the enforcement of the provisions of the Act.

"To adopt this strained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress, as evidenced by the repeated limitations of the applicability of the Act,

to those subject to its provisions. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects.

"In the exercise of the judicial power to review questions of law, as conferred by an act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever have been vested in the courts, unless Congress intended that such review should be judicially exercised?

"With characteristic forcefulness of expression, Mr. Justice Holmes said . . . 'Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinates agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . .

"On the issue of fact tendered by appellant's answer, the Administrator must show that appellant is engaged in interstate commerce or in the production of goods for interstate commerce before he will be en-

titled to the relief prayed in his application. On the hearing of this issue, both appellant and appellee will be privileged to introduce evidence."

NO. 2

"Does the Administrator of the Wage and Hour Division have an absolute right to a compliance order from the district court, for the enforcement of an investigatory subpoena duces tecum . . . without regard to whether the business involved actually is under the Act or whether reasonable ground exists for believing that it is subject to the Act?

"None of our previous decisions directly answers the question here. In Cudahy Packing Co. v. Fleming, 8 Cir. 122 F (2d) 1005, (reversed on another ground, sub nom. Cudahy Packing Co. v. Holland, 315 US 785, 62 S. Ct. 803, L. Ed. 1191) we held that where some phase of the general business conducted by an employer was admitted to be subject to the Fair Labor Standards Act, the Administrator, without further showing as to coverage, was entitled to a compliance order for the enforcement of a relevant and reasonable investigatory subpoena duces tecum for the business as a whole . . . We regarded the fact that part of the employer's business was admittedly subject to the Act as a sufficient warrant for judicial aid in enforcing an investigatory subpoena duces tecum for the business as a whole, to enable the Administrator to determine the exact extent of the subject operations and employee-coverage in the entire

industry, including the relationships between the several plants.

"We have thus recognized that the question of actual coverage under the Act, as to particular employees, business-departments, or plant-units, in an industry sought to be investigated by the Administrator, is not a matter which the employer is entitled to have formally tried out and adjudicated in the district court on an application to enforce an investigatory subpoena, where reasonable ground appears to exist for making the investigation.

". . . appellees attempt to distinguish that case from the present situation on the ground that there is no admission here that any part of the employer's business is subject to the Act, nor has the Administrator alleged or offered to prove such is the fact.

"We think the principle applied by us in the Cudahy Packing Co. is controlling here, but its reaches do not extend as far as either the Administrator or appellees antithetically contend . . . .

"Thus, while it is our view that the employer is not entitled to a trial and adjudication of the question of coverage on the Administrator's application to enforce an investigatory subpoena, and that the Administrator is not required to make proof of actual coverage as a basis for judicial aid in its enforcement, we believe that the district court, is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but

that reasonable ground exists for making the investigation. Judicial enforcement necessarily is the exercise of judicial power, and judicial function can never wholly escape the test of judicial responsibility.

"The sound test of judicial responsibility is not, of course, its lavishness of concern, but its measured adherence to the actual need of, and its authority in, the situation with which it is required to deal. Over responsibility may be as much an abuse of judicial power and function as irresponsibility . . . and the courts must conscientiously guard against any instinct of over protectiveness, which may unwarrantedly and needlessly impede proper administrative effort or result . . . But . . . they must not sweep aside the fundamental and inherent concept that a judicial responsibility is owing for any judicial function that they are called upon to perform—a responsibility that necessarily must soundly cover (but not attempt to extend beyond) the scope of the required function.

". . . if it was intended to be implied that the Administrator should have the power also to make an investigation, through subpoena, of every industry in the country, regardless of whether it had even a probable or apparent relationship to the Act, the statute would in our opinion be going beyond any previous implied grant of administrative authority. It would require more explicit and unmistakable language than is contained in the present Act to induce us to believe 'that Congress intended to authorize one of its

subordinate agencies to sweep all our traditions into the fire.'

"To require the Administrator *to satisfy the district court* that he has reasonable ground to believe that the industry sought to be investigated is subject to the Act, as a basis for the issuance of a subpoena enforcement order, is not an impeding of sound investigatory effort. The obtaining of sufficient general information to indicate whether an industry is, in any aspect of its business, apparently and probably engaged in interstate commerce or in the production of goods for interstate commerce certainly does not itself depend upon the use of a subpoena power, for the general nature of a business cannot be that closely concealed. In any event, the law cannot sacrifice responsibility of action for mere ease in its performance."

NO. 3

"It is obvious that there might be a manufacturing process so closely related and incidental to a retailing business as that none would argue it was separate and distinct. Making ice cream is manufacturing. Ice cream is sold at the fountain in the corner drug store. Perhaps a boy is employed to turn an ice cream freezer in an anteroom. All the cream he makes is sold in the store. Is not that manufacturing incidental to and a part of the retailing business? Again, there is a little store where loaves of bread are sold at retail. One person attends at the counter and sells to customers. Another, in a back room, gives all her

time to baking bread to be sold. Is not that manufacturing purely incidental to the retailing? And would not the answers be the same if the soda fountain were a block long and the services of five boys turning freezers were required; if the demand for bread were so great that the services of five bakers manufacturing bread were required to meet it?

"Before we have read a single case cited by learned counsel it seems clear to us that manufacturing conducted by a retail merchant solely to serve his customers buying at retail over his counters, it seems to us that that manufacturing is incidental to the retailing. Whether the counter over which he sells is ten feet long or a block long. Whether the retailer has one store or two or five. Whether the incidental manufacturing is carried on in the basement of a store or in the attic or in some other convenient place. We are convinced, therefore, that the manufacturing carried on in defendant's candy kitchen solely to provide candy for customers in defendant's retail store is a manufacturing incidental to retailing and that, in the sense of the statute, the employees in the candy kitchen are employed in the retail establishment.

(Then follows an extensive discussion of the law) In talking about the conduct of the employer, the court said:

"It is impossible, however, to believe that this defendant has not acted throughout its controversy with plaintiff in good faith. It has believed it was

right in its interpretation of the law and we believe it was right. It was advised by outstanding counsel that it was right. Why should its president not have acted in accordance with his conscientious belief and the advice of counsel? *The American citizen is not required, like a trained animal in a circus, to jump through a hoop at every crack of the whip of an agency of the executive.* And as to whether a declaration of intention is to be accepted at face value or is to be rejected and disregarded, that depends upon the character of the man by whom the declaration of intention is made. The president of the defendant company impressed us on the witness stand as a man of integrity. We noted that he would not even say that he would not abide by the judgment of *this* court, but said, in effect, he would abide by the judgment of the highest court. That might not have been a diplomatic announcement to make, but it was consistent with the American character. His whole conduct and demeanor in court were those of an honest man, an impression corrobated by the agreed statement of facts which sets out that this man has so served the people of Kansas City for fifty years that his business has grown from one of trifling proprtions to a great and successful enterprise. *The declaration of such an individual is not to be put in the same category with that of some fly-by-night.* (*Italics ours*).